

COUNTY ISSUES WORKGROUP

**CONSENSUS ITEM**

ITEM NO.: 4 Version Date: July 30, 2001

ITEM TITLE: HIPAA and the County Human Resources Department

**Premise**

The HIPAA Privacy Rules do not apply directly to a County Human Resources Department, within the hybrid entity that is the County, unless they perform covered functions that qualify them as a health care component of the hybrid entity.

**Reasoning**

**Standard:**

From the Preamble to the Privacy Rules:

**PART 160 - SUBPART A - GENERAL PROVISIONS**

Part 160 applies to all the administrative simplification regulations. We include the entire regulation text in this rule, not just those provisions relevant to this Privacy regulation. For example, the term "trading partner" is defined here, for use in the Health Insurance Reform: Standards for Electronic Transactions regulation, published at 65 FR 50312, August 17, 2000 (the "Transactions Rule"). It does not appear in the remainder of this Privacy rule.

Sections 160.101 and 160.104 of Subpart A of part 160 were promulgated in the Transactions Rule, and we do not change them here. We do, however, make changes and additions to § 160.103, the definitions section of Subpart A. The definitions that were promulgated in the Transactions Rule and that remain unchanged here are: Act, ANSI, covered entity, compliance date, group health plan, HCFA, HHS, health care provider, health information, health insurance issuer, health maintenance organization, modify or modification, Secretary, small health plan, standard setting organization, and trading partner agreement. Of these terms, we discuss further in this preamble only covered entity and health care provider.

**160.102 Applicability of the Privacy Rules:** The Privacy Rules apply to a health plan, a health care clearinghouse, or a health care provider who transmits health information in electronic form in connection with a covered transaction.

**160.103 Definitions:**

*Health Plan* (2) *Health Plan excludes:*

(i) Any policy, plan, or program to the extent that it provides, or pays for the cost of, excepted benefits that are listed in section 2791(c)(1) of the PHS Act, 42 U.S.C. 300gg-91(c)(1); and

(ii) A government-funded program (other than one listed in paragraph (1)(i)-(xvi) of this definition):

(A) Whose principal purpose is other than providing, or paying the cost of, health care; or

(B) Whose principal activity is:

(1) The direct provision of health care to persons; or

(2) The making of grants to fund the direct provision of health care to persons.

**164.501 Definitions:**

*Covered functions* means those functions of a covered entity the performance of which makes the entity a health plan, health care provider, or health care clearinghouse.

**164.504 Uses and disclosures: organizational requirements:**

(a) Definitions:

*Health care component* has the following meaning:

(1) Components of a covered entity that perform covered functions are part of the health care component.

*Hybrid entity* means a single legal entity that is a covered entity and whose covered functions are not its primary functions.

(b) Standard: health care component. If a covered entity is a hybrid entity, the requirements of this subpart, other than the requirements of this section, apply only to the health care component(s) of the entity, as specified in this section.

164.504(c)(1) states: (c)(1) Implementation specification: application of other provisions. In applying a provision of this subpart, other than this section, to a hybrid entity:

(i) A reference in such provision to a “covered entity” refers to a health care component of the covered entity;

(ii) A reference in such provision to a “health plan,” “covered health care provider,” or “health care clearinghouse” refers to a health care component of the covered entity if such health care component performs the functions of a health plan, covered health care provider, or health care clearinghouse, as applicable; and

(iii) A reference in such provision to “protected health information” refers to protected health information that is created or received by or on behalf of the health care component of the covered entity.

The Transaction and Code Sets rules, on page 50317 of the Preamble, where it states, "Transactions may be used by both covered entities and other entities. For example, the enrollment and disenrollment in a health plan transaction is most commonly sent by employers or unions, which are not covered entities, to health plans, which are covered entities. "

### **Implications**

The statement in the Preamble to the Privacy Rules indicating that section 160 is an update to and replacement of the same section published in the Transaction and Code Set rules provides the basis for this Consensus Item. It means that changes and additions to section 160 apply to both the Privacy Rules and the Transaction and Code Set Rules. The health plan exclusions in section 160.103 are new in the Privacy Rules, but they also apply to the Transaction Rules as well.

Simply being an employer, even if the employer receives and maintains individually identifiable healthcare information, does not make the employer a covered entity.

The statement from the Preamble is key; it implies that the rules are specifically targeted at the health care industry. This clear statement that employers, and by extension a Human Resources Department, are not healthcare components is not contradicted or overridden by the Privacy Rules. In fact the Privacy Rules, in its modification of section 160, add exclusions that further support the case for Human Resources Departments being outside the bounds of HIPAA.

If the Human Resources Department performs covered functions, it becomes part of the health care component.

None of this means that Human Resources will not be impacted by HIPAA. In all likelihood, a formal Authorization will be required to obtain the results of a pre-employment physical. (Note: A Business Associate Agreement or a substantially similar MOU is not the appropriate vehicle for obtaining pre-employment information from providers.) There are also conditions and restrictions on what information can be passed to a sponsor of a Group Health Plan in Section 164.504(f)(1). These rules apply to the Group Health Plans directly, but they will affect the information that Human Resource Departments can obtain from them.

**ITEM CHRONOLOGY**

Workgroup Draft: 07/24/2001

Workgroup Approved: 07/30/2001

Approved Revisions: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_

**SUPPLEMENTAL MATERIALS**

Links to supporting legal and content expert opinions.